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United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,
Appellant,
vs.
Grand Canyon Cattle Company,
a Corporation,
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

BRIEF OF RESPONDENT.

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The only point relied upon by the appellant in this case in support of its appeal is that set out in the 53rd assignment of error, which, according to the statement of counsel for appellant on page four of his brief, is substantially stated as follows: "The District Court erred in holding that the defendant company was a *bona fide* purchaser without notice." We understand the rule to be that all other assignments of error set out in the record are to be considered as having been abandoned or waived.

STATEMENT OF FACTS.

A somewhat fuller statement of the facts of the transaction which resulted in the purchase by the respondent, Grand Canyon Cattle Company, of the lands in controversy than is set forth in appellant's brief, will conduce, we believe, to a better understanding of the case and of our argument in support of the decree of the lower court.

It appears from the uncontradicted testimony of Mr. E. J. Marshall that until the year 1889 he had engaged principally in the railroad, banking and ranching business in the state of Texas. In 1889 he came to California and engaged in banking, ranching and farming. That he has never been engaged in mining and has had no acquaintance with mineral-bearing lands as such [R. 307]. That his attention was called to the "V. T. Ranch," in Arizona, where the claims in controversy are located, by reason of having received steers from there for his Chino ranch, in California, for the purpose of fattening. This was about the year 1906 or prior thereto. On account of the character of the cattle thus received he became interested in the property and made inquiry about the same. [R. 311, 312, 321.] As a result of these things Mr. Marshall ascertained that Saunders was the owner of the property but that it was not for sale. In the late winter of 1906 or spring of 1907 Mr. Marshall was at Salt Lake (his residence at all times being at Los Angeles), and he then met Mr. Saunders and stated to him that he was desirous of getting a ranch for breeding purposes. Saunders referred him to a property in Nevada

owned by another party, but no negotiations were had respecting the V. T. Ranch, as Mr. Saunders did not desire at that time to sell the same. [R. 312, 321.] At a later date, and in 1907, Mr. Saunders notified Mr. Marshall that on account of ill health he was willing to sell the ranch. Thereupon an arrangement was made which resulted in Mr. Marshall going to the ranch to look over the same. [R. 322.] This trip to the ranch was made in June, 1907. [R. 307.] On that occasion Mr. Marshall drove over the ranch, staying at the Jacobs Lake claim over night. *He did not go into any of the tunnels or excavations nor examine the character of the ground,* as he had no interest therein as a mining proposition. The next day following the night spent at Jacobs Lake he left and went over other parts of the ranch, *but did not get nearer any of the other patented claims in controversy in this suit than from half a mile to a mile.* On page 309 of the record his testimony appears as follows. referring to the visit just mentioned,—"The only one of those claims we visited on this occasion was Jacobs Lake. I didn't go to any of the others. The closest we went to any of the others I should say was a half a mile to a mile."

Subsequently, in September, 1907, Mr. Marshall, in company with Mr. Isaac Millbank and Mr. Nicholas Millbank, friends of Mr. Marshall's, visited the V. T. Ranch, but, as Mr. Marshall says: "The occasion of my going was more a pleasure trip than anything else * * * it was more like a camping trip." On this occasion Mr. Marshall spent one night at Jacobs Lake, *but did not visit any of the mining claims.*

[R. 312, 313.] With respect to these visits he says: "My examination of those lands was not with reference to mineral. There was no statement made to me by anybody with respect to their mineral character or with respect to their development." [R. 313.] Between these two visits to the ranch of June and September, 1907, to-wit, on July 30, 1907, the contract for the purchase of the ranch by Mr. Marshall was executed. This contract is defendant's "Exhibit B." [R. 433.] By this contract Mr. Marshall agreed to purchase the ranch and cattle from Mr. Saunders, who agreed to sell the same for the following price: $50,000 for the real property, fixtures and equipment, and $16.00 per head for all the livestock. By a later arrangement the price for the horses on the ranch was fixed at $20.00 per head. Besides the patented claims in question there were other unpatented claims which were included in the purchase, but it will be noted that the contract provides that the patented claims were to be conveyed by a warranty deed, whereas the other and unpatented claims were to be covered by a quitclaim deed. [R. 437.] The time of payment was as follows: $15,000 on the signing of the agreement; $100,000 upon the transfer of the property on or before November 1st, 1907; the balance upon the delivery of the stock on or before November 1st.

Upon the execution of this contract in July, 1907, Mr. Marshall paid the initial payment of $15,000 to Mr. Saunders [R. 312], which sum was subsequently repaid to him by the Grand Canyon Cattle Company [R. 314.] As was contemplated by the contract, the respondent company was incorporated for the purpose

of taking over the property. The charter of the respondent company is dated October 4, 1907. [R. 408.] The organization of the company, however, was not effected until the latter part of October. On November 29, 1907, Mr. Marshall was elected president in place of Mr. Stevens, who had been elected president at the first meeting, only, however, as a nominal president for the purpose of effecting the organization, and Mr. Marshall has been president ever since. [R. 313-314.]

The contract of July 30, 1907, for the purchase of the ranch, was assigned to the Grand Canvon Cattle Company November 29th, 1907. Assignment shown by defendant's Exhibit C. [R. 444.]

Before the fulfillment of the contract it was modified somewhat as to the time of making the payments with the result that $30,000 was paid December 5, 1907, when Mr. Marshall went to Salt Lake to close the matter up [R. 314, 315], and at the same time negotiable promissory notes were given by the Grand Canyon Cattle Company for the aggregate sum of $65,150.00, one of which was paid a few days before maturity, the balance at maturity or a few days thereafter. The notes were all dated December 5, 1907, and were payable sixty days from date. [R. 316.] The balance of the purchase price, amounting to $102,761.24, was represented by four notes of the company, secured by a mortgage on the real property dated December 5, 1907. These notes were payable in two years and were paid at or before maturity, the mortgage being released June 10, 1909. [R. 316, 402, 404.]

At the time of the payment of the $30,000.00, December 5, 1907, a warranty deed covering the patented claims in controversy was executed by Mr. Saunders to the Grand Canyon Cattle Company as assignee of Mr. Marshall, and quitclaim deeds were made of the other properties, all as provided in the contract. [R. 314, Government's Exhibit 38-P; R. 400.]

It will be noted that while the deeds in question from Mr. Saunders to Grand Canyon Cattle Company were dated December 2nd, they were acknowledged December 5th, which would accord with the testimony of Mr. Marshall that the transaction was closed on December 5th.

It is proper, we think, at this time to invite the court's attention to the fact that Mr. Marshall testified that before closing this transaction at the time above stated, he took the advice of a lawyer who was a member of the firm of Pearce & Critchlow, attorneys at Salt Lake, respecting the title, and that Mr. Pearce was at that time the assistant secretary of the Interior. Mr. Critchlow advised Mr. Marshall in substance that the patents were valid and that he could rely on the same. [R. 315.]

The contract of purchase was witnessed by Mr. Pearce.

Mr. Marshall testified that the purchase price of the property described in the contract was a fair price therefor and showed by his experience that he was qualified to speak as an expert. [R. 319, 320.] Before the transaction was closed by the giving of the deeds and the payment of the purchase price and the giving

of the mortgage, Mr. Marshall was furnished with an abstract, which appears in the record. [R. 445 *et seq.*] Mr. Marshall testified that the first time he ever heard any claim of any fraud or irregularity with respect to the issuance of the patents sought to be set aside was when this suit was brought, which was May 5, 1912, that being the date when the bill was filed. [R. 15.] The patents sought to be set aside in this case were dated respectively as follows:

Sunset Mill Site and Sunset Mining Claim, June 9, 1906. [R. 355, 359.]

Jacobs Mining Claim, March 18, 1907. [R. 363, 367.]

Noon Day Mining Claim, June 22, 1907. [R. 370, 374.]

Emmet, October 20, 1906. [R. 377, 381.]

Such, in brief, is a fair and correct history of the acquisition of this property by the Grand Canyon Cattle Company, respondent herein, from which it appears that this property was purchased by the Grand Canyon Cattle Company and Mr. Marshall in the best of faith, without any notice whatsoever of the alleged fraud in the procurement of said patents, and that a fair price amounting to many thousands of dollars was paid therefor.

ARGUMENT.

It is claimed first by counsel for appellant that under the pleadings in this suit the defense of a *bona fide* purchaser could not legally be interposed at the trial. It may be true that the weight of authority is in favor

of the proposition that the defense of *bona fide* purchaser is one that must be affirmatively set up by a defendant relying thereon. But examination of the authorities will show that by no means is the rule universal. We contend, however, that even if such be the rule of pleading, we have complied therewith. The respondent herein affirmatively alleged all of the facts essential to show that it was a *bona fide* purchaser of the lands in controversy. It may be that this defense was not pleaded in absolutely correct form, nor with the particularity suggested in the case referred to by counsel in his brief, yet it must be conceded that there was a *bona fide* effort on the part of the respondent to plead this defense, and any objection as to the form thereof comes too late on this appeal. It should have been made either by a proper objection to the pleading in the court below and before the trial, or by an objection to any testimony in support of such defense when offered by the respondent at the trial. If this had been done and the court had deemed the objection well taken, undoubtedly permission to amend would have been granted, and the respondent, if it felt so advised, would have made the necessary amendment; for the facts as shown by this record would clearly have warranted it. Instead of any such course as this having been pursued, respondent, through its counsel, in the court below, proceeded with the trial of the case upon the theory and assumption that the issue had been properly raised and that evidence thereon was properly admissible. It will be noted that nowhere in the record is there a suggestion

that either the court or counsel for the appellant had any doubt as to this issue having been raised by the pleadings or that the appellant had any objection whatever to the trial of such issue. Counsel for appellant on this appeal in his statement of the issues raised by the pleadings, on pages 2 and 3, says: "The company claimed (by its answer) that it had purchased the lands for a valuable consideration in good faith and that it took the title relying upon the patents that had been issued by the government." He also states on page 3 that the *government offered evidence intended* "to show that the officers of the defendant company had knowledge of the illegality of the claims prior to their purchase from Saunders." It would seem that this affords conclusive evidence that all parties considered the issue of *bona fide* purchaser to have been fairly raised by the pleadings and that the case was tried upon that theory, both by the court and by counsel. On the same point we further invite the court's attention to the statement in the "Memorandum Opinion" of the Honorable Judge who presided at the trial of this case in the lower court, appearing on page 465 of the record, as follows: "Saunders, one of the respondents, died several years prior to the date of the filing of the suit. The Grand Canyon Cattle Company answered disclaiming all knowledge of the alleged fraud on the part of Saunders, *and setting up that it was a bona fide purchaser without notice*, for value, after the issuance by the government to Saunders of said patents." (Italics ours.) Certainly there can be no doubt as to how the court regarded the issues, and

there is nothing in the record to suggest in the slightest degree that the counsel for the government who tried the case had any different notion or understanding; on the contrary the record everywhere shows that they regarded the issue as squarely raised and proper to be tried, and, we might add, they did try it to the best of their ability, but as both the facts and the law were against them they lost and justice prevailed.

Even if this defense had not been affirmatively set up by respondent, we believe that the point relied upon by appellant cannot now be made on this appeal; for the reason among others that the appellant in its bill anticipated the defense of *bona fide* purchaser. In paragraph six of the original bill it is alleged as follows:

> "The plaintiff further shows that on the 2d day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the lands described as 'Jacob lode claim' and 'Emmett lode claim' to the defendant corporation, The Grand Canyon Cattle Company, and on the 5th day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the land described as the 'Noonday lode claim,' the 'Sunset lode claim' and the 'Sunset Millsite' to the said defendant corporation, The Grand Canyon Cattle Company, which said company at the times of the execution of the said deeds and prior to any contract or agreement to purchase said lands or any part thereof from the said B. F. Saunders was fully notified and informed of the said illegal methods and proceedings by means of which the said G. F. Saunders had acquired plaintiff's patents for said lands." [R. p. 12.]

And in the amended bill, paragraph six, the defense is anticipated by even more complete allegations, thereby indicating in the clearest manner possible that appellant intended to raise the issue of *bona fide* purchaser and expected that it would be considered and determined at the trial. We quote from the amended bill, paragraph six, as follows:

> "That plaintiff further shows that on the 2d day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the lands described as 'Jacob lode claim' and 'Emmett lode claim' to the defendant corporation, The Grand Canyon Cattle Company, and on the 5th day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the land described as the 'Noonday lode claim,' the 'Sunset lode claim' and the 'Sunset Millsite' to the said defendant corporation, The Grand Canyon Cattle Company, which said company, at the time of the execution of the said deeds, and prior to any contract or agreement to purchase said lands, or any part thereof, from the said B. F. Saunders, was fully notified and informed of the said illegal methods and proceedings, and at all times herein mentioned well knew said methods and proceedings to be false, fraudulent and untrue, and well knew said methods and proceedings were the means by and through which the said B. F. Saunders acquired plaintiff's patents for said lands." [R. p. 30.]

The allegations of the amended bill above quoted were all denied by the defendant's answer, from which we quote as follows:

"Further answering the plaintiff's amended complaint, this defendant says: That it admits that on, to-wit, the second day of December, 1907, the said B. F. Saunders executed a deed conveying the title to the lands described in said plaintiff's amended bill of complaint as 'Jacob Lode Claim' and 'Emmett Lode Claim,' to this defendant, the Grand Canyon Cattle Company, and admits that on, to-wit, the 5th day of December, 1907, the said B. F. Saunders executed a deed conveying the title to the land described in said amended bill of complaint as the 'Noonday Lode Claim,' the 'Sunset Lode Claim' and the 'Sunset Mill Site' to this defendant, the Grand Canyon Cattle Company. But this defendant specifically denies that at the time of the execution of said deeds and prior to any contract or agreement to purchase said lands or any part thereof from said B. F. Saunders, or at any time or in any manner whatever, it was notified and informed of the said illegal methods and proceedings or any illegal methods and proceedings by means of which the said B. F. Saunders had acquired plaintiff's patents for said lands, and denies that at said times or at any time this defendant knew of any false or fraudulent methods and proceedings were or had been adopted or practiced by the said B. F. Saunders for the purpose of acquiring the title to said lands from said plaintiff." [R. pp. 458-459.]

Following these denials are the affirmative allegations which substantially set out that respondent was a *bona fide* purchaser for a valuable consideration without notice or knowledge of the alleged fraudulent acts of Saunders in the procurement of the patent.

The object of pleadings is to define the issues so that the parties and the court may understand the questions that are raised and which are to be decided. Certainly, in view of the allegations contained in the bill above referred to and the denials thereof in the answer, together with the affirmative matter set up, it cannot in good faith be claimed that complainant was in any way misled or that it did not clearly understand that the issue of *bona fide* purchaser was to be tried and determined.

Where a defense is thus anticipated by allegations in the bill a complainant is in no position, particularly on an appeal, to claim that the affirmative defense was defectively pleaded. We quote from Verner v. Verner, 1 So. Rep. (Miss.) 53, as follows:

> "By her bill the complainant anticipated and negatived the defense which she expected the grantee to interpose, viz., that he was a *bona fide* purchaser for value. By his answer, which is responsive to the allegations of the bill, he replies that he purchased in good faith the lands conveyed to him and paid full value therefor. In this condition of the pleadings the burden was devolved on the complainant of establishing the allegations of her bill thus responded to by the grantee."
>
> Jenkins v. Pye, 12 Peters 241, 252; and see first paragraph of syllabus

The cast last cited is referred to by Professor Street in his work "Federal Equity Practice, Vol. 1, section 745, in support of the rule stated by him, as follows:

> "§745. Qualification of General Rule.
>
> "The rule that disables a party defendant from

offering proof of a specific defense not specially pleaded by him is limited to matters of affirmative defense in avoidance of the case stated in the bill. It does not apply where the matter offered in proof by the defendant controverts a statement contained in the bill, which statement is denied in the answer. If a bill makes a specific allegation, which allegation is at the basis of the equity of the suit, and the answer contains a sufficient denial of such allegation, the defendant can offer evidence at the hearing in disproof of such allegation of the bill, though his answer has not specifically set forth the facts constituting this matter of defense. It should be remembered that all that is ever necessary to make proof admissible is that the facts to which the proof is directed should be properly in issue; and it is enough that the specific allegation should be found in the bill and denied by the answer.

"Jenkins v. Pye (1838), 12 Pet. 241, 9 L. Ed. 1070: A bill to set aside a deed alleged that it was wholly without consideration, though a nominal consideration was recited. The answer denied the allegations of the bill. The defendant put in evidence the fact of the payment of two thousand dollars, or its equivalent, as a consideration. The court held that this proof was admissible without any allegation in the answer that such a consideration was paid. It rebutted the allegation in the bill that the deed was without consideration."

As showing that the appellant was in nowise misled by what counsel claims to be the defective character of respondent's answer or plea, but on the contrary that its attorneys fully understood that the issue had been raised and was to be tried, we again call attention to

the statement on page three of appellants' brief to the effect that *appellant* offered evidence "intended to show that the officers of the defendant had knowledge of the illegality of the claims prior to their purchase from Saunders." Also to the statement on the same page that "the company claimed that it had purchased the lands for valuable consideration in good faith." From the statement last quoted it would seem that counsel who wrote the brief on this appeal likewise had no difficulty in determining that the issue of *bona fide* purchaser was raised by the respondent's answer, to say nothing of the allegations in appellant's own bill, whereby the defense was clearly anticipated.

When counsel says that the respondent claimed it was a *bona fide* purchaser, undoubtedly he had reference to the claim thus made in the affirmative matter set up in the answer.

An objection to the sufficiency of an answer or plea cannot be first raised on appeal, after the case has been tried on the merits, and evidence introduced in support of the defense made by such an answer, without objection.

We quote from the opinion of Justice Brewer in the case of Smith & Davis Mfg. Co. v. Mellon, 58 Fed. 705, 706, as follows:

> "This case is before us on an appeal from a decree of the Circuit Court of the United States for the eastern district of Missouri, dismissing the plaintiff's bill. The suit was one for the infringement of a patent, that patent being No. 269,242, dated December 19, 1882, issued to John G. Smith, and by him assigned to complainant, and was for

an improvement in spring beds. The ground on which the Circuit Court dismissed the bill was that the invention covered by the patent had been in public use and on sale for more than two years prior to the date of the application, and that for this reason the patent was void. 52 Fed. 149. Counsel for the appellant insists that this defense was not properly presented by the pleadings, and, therefore, that all testimony tending to support it should be ignored; further, that the only use disclosed by the testimony was an experimental one, and therefore not such as to avoid the patent; and, finally, that the precise invention for which the patent was obtained was not in use or on sale prior to the application for the patent.

"With reference to the first of these propositions but a word is necessary. The statute (Rev. St., §4920, cl. 5) provides for, among other special defenses to a suit for infringement, this: that the invention has 'been in use or on sale in this country for more than two years before his application for a patent.' The answer set up 'that the alleged invention was in public and common use, and on sale, with and by the knowledge and consent of the patentee, for more than two years before the application.' It did not in terms allege that such public use was 'in this country,' as the statute provides. While this defense may not have been pleaded with technical accuracy yet the testimony tending to establish it was received on the final hearing without any objection. *The first time the question has been raised, as appears from the record, is on the argument of the appeal in this court; and here it is too late.* Roemer v. Simon, 95 U. S. 214, 220; Loom v. Higgins, 105 U. S. 580, 595." (Italics ours.)

In the case of Ogden Building & Loan Association v. Mensch, 63 N. E. (Ill.) 749, the court, in its opinion, says:

> "If the appellant regarded the averments of the answer as but a mere legal conclusion, and insufficient to warrant the introduction of evidence, it should have filed exceptions to the answer, or, on the hearing before the master, should have objected to the admission of the evidence tendered for the purpose of proving facts upon which rested that which the appellant regarded as but a mere legal conclusion. Again, opportunity to prefer that objection was offered on the coming in of the master's report. Had any such timely objection been made by the appellant association, the objection might have been obviated by an amendment of the answer. Having tried the case precisely as if the defense was that the notary public was disqualified to take the acknowledgment, and that for that reason the acknowledgment was void, had been formally and technically pleaded, the appellant association cannot be permitted to shift its position, and urge in this court, for the first time, objections which might have been obviated had they been preferred in the trial court. Improvement Co. v. Whitehead, 128 Ill. 279, 21 N. E. 569; Brainerd v. Hudson, 103 Ill. 218; Gehrke v. Gehrke, 190 Ill. 166, 60 N. E. 59; Coal Co. v. Wombacher, 134 Ill. 57, 24 N. E. 627."

In the case of Perego v. Dodge, 163 U. S. 160, 164, where it was claimed on appeal that affirmative relief was improperly awarded because no cross-complaint was filed, the Supreme Court of the United States, speaking through Chief Justice Fuller, said:

"Nor did the Supreme Court of the United States err in overruling the contention that affirmative relief was improperly awarded defendants because they had filed no cross-complaint. Such relief was sought by the answer which was treated by the parties and proceeded on by the court as equivalent to a cross pleading. The objection came too late in the appellate tribunal. Coburn Cedar Valley Land Co., 138 U. S. 196, 221."

In Planing Machinery Co. v. Keither, 101 U. S. 479, 492, the question of the right to raise for the first time on appeal the sufficiency of an answer was considered by the Supreme Court of Iowa.

Willson v. Harris *et al.*, 27 N. W. (Ia.) 374, 375;

Beacham v. Gurney, 60 N. W. (Ia.) 187.

We quote from the opinion of the United States Supreme Court in Loom Co. v. Higgins, 105 U. S. 595, 596, as follows:

"The appellants' counsel has raised the question whether the defense of prior invention can be set up under the answer, which does not state it in the manner required by the statute. It denies, generally, it is true, that Webster was the original and first inventor of the improvement claimed in the patent; and specifies certain letters-patent issued in this country and in England in which it is alleged that the said invention, or material and substantial parts thereof, was described before any invention made by Webster, which is sufficient foundation for adducing such patents in evidence; but it does not give the name and residence of any person alleged to have invented the thing patented

prior to Webster; it only states that it was used and known to Davis. It is possible that this objection to the evidence would have been available if it had been taken in season. But we are not referred to anything to show that it was taken in the court below, or before the examiner when the witnesses were examined. In Roemer v. Simon (95 U. S. 214, 220) we held that the failure to interpose such objection before the final hearing is a waiver of the required notice in an equity suit."

We quote from the opinion of Judge Hawley delivering the opinion of this honorable court in the case of Great Northern Ry. Co. v. McLaughlin, 70 Fed. 671, as follows:

"1. It is contended that the complaint does not state facts sufficient to constitute a cause of action. This contention, in our opinion, is not well taken. It does not affirmatively appear from the allegations of the complaint that the injury of which McLaughlin complains was caused by the negligence of his fellow servants. The complaint avers that the injury was caused by the gross negligence of the railway company in the selection and use of improper skids by its superintendent and agent in loading steel rails upon its cars. It is subject to criticism, and is, perhaps, somewhat ambiguous and uncertain. It, however, states a cause of action, imperfect in some respects; but, inasmuch as no ruling was ever called for upon the demurrer filed thereto, the railway company cannot urge any objections to such defects for the first time in the appellate court."

It is true that some of the cases to which we have referred, as for instance, the one last cited, were law

actions, but we do not perceive any good reason why the principle involved should not control in a suit in equity as well as in an action at law, and that our contention in this behalf is correct, is shown by the ruling in a number of equity cases to which we call attention herein.

It will be noted that in the cases cited it was deemed sufficient to invoke the rule that the objection would not be considered on appeal, where no objection was made below, either to the evidence or to the pleading; but the case at bar presents a stronger reason for the application of the rule, since here, not only was there no objection made to the pleading or to the introduction of any testimony offered in support thereof, but the complainant, the appellant herein, voluntarily and as a part of its case, anticipated such defense and offered testimony for the purpose of refuting the same. True, such testimony was of no weight, as is impliedly confessed by the counsel for appellant on this appeal, since none of the testimony offered by appellant is referred to in its brief; nevertheless, the attempt to make the proof is sufficient to invoke the rule upon which we rely.

A replication was filed in this case by appellant. [R. p. 461.]

In the case of Bean v. Clark, 30 Fed. 225 (Cir. Ct. N. Y.), the court says:

> "The plea of the defendants goes to the whole bill. The complainant has taken issue upon the plea, and the case is now here upon the proofs. The only inquiry is whether the proofs establish the facts alleged in the bill. If they do, the de-

> fendants are entitled to judgment upon the plea, even though, had the plea been set down for argument, the facts averred would not authorize a judgment. Having taken issue upon the plea, the complainant cannot now assert that the facts alleged are not a good defense to the bill. Story, Eq. Pl. 697; Rhode Island v. Massachusetts, 14 Pet. 210; Myers v. Dorr, 13 Blatchf. 22; Bogardus v. Trinity Church, 4 Paige 178; Birdseye v. Heilner, 26 Fed. Rep. 147."

Even admitting, for the purpose of argument, that the matter quoted in appellant's brief from Wright Blodgett Company v. United States, states the law in respect to the manner of pleading the defense in question, yet it is by no means controlling in the case at bar, first, for the reasons already given that an objection to a defective answer or plea cannot be made for the first time on appeal, as shown by us—and second, because in the case at bar we are not dealing with a decree *in favor* of the complainant founded upon a finding that the defendant was *not* a *bona fide* purchaser, which was the fact in the case referred to in appellant's brief. The case cited by the counsel is based upon language found in the opinion in the case of Boone v. Chiles, which enunciates a rule of pleading considered proper under the old practice where an answer served both as a pleading and as evidence.

Unlike the case relied upon by counsel when the court below found that defendant was not a *bona fide* purchaser, the court, in the case at bar, tried the case on the merits upon pleadings which it and the appellant deemed sufficient to raise the defense of *bona fide*

purchaser, and it found that the defendant was such a purchaser; plaintiff's objection comes entirely too late, even admitting that it would ever have had any validity whatever.

In the case of Lowden v. Wilson, 84 N. E. 245 (Ill.), where a bill was filed by a person claiming to be a *bona fide* purchaser to set aside a quitclaim deed as a cloud upon his title, the point was made that the bill should have alleged that the consideration "was *bona fide* and truly paid independently of the recital in the deed." The court, in passing upon this question, said:

> "Plaintiff in error insists that the bill in cases of this kind must state, among other things, the consideration, with the distinct averment that 'it was *bona fide* and truly paid, independently of the recital in the deed,' and that this bill failing to do so, is fatally defective, citing in support of this contention, Brown v. Welch, 18 Ill. 343, 68 Am. Dec. 549; Moshier v. Know College, 32 Ill. 155; Keys v. Test, 33 Ill. 316; Boone v. Chiles, 10 Pet. (U. S.) 177, 9 L. Ed. 388; Johnson v. Georgia Loan & Trust Co., 141 Fed. 593, 72 C. C. A. 639, and other cases of the same import. Plaintiff in error is not in position to raise the point. The defect, if any, is simply in the form of the pleading, and if not taken advantage of by demurrer, it is waived. 1 Daniell's Ch. Pl. & Pr. (6th Am. Ed.), p. 582; Dupuy v. Gibson, 36 Ill. 197; Fisher v. Stone, 3 Scam. 68; Judson v. Stephens, 75 Ill. 255. Had the objection been made on the hearing, the defect, if any, could have been obviated by amendment. Kuchenbeiser v. Beckert, 41 Ill. 172; Holman v. Gill, 107 Ill. 467. Neither the

answer nor cross-bill of plaintiff in error raises this question of pleading but they join issue and deny consideration of any kind was paid by defendant in error to the vendor."

Also:

"The title of a subsequent purchaser whose deed is first recorded will not be defeated on the ground of notice of a prior unrecorded deed, 'unless the proof of such notice is so clear and positive as to leave no reasonable doubt that the taking of the second conveyance was, under the circumstances, an act of bad faith towards the first purchaser. The fact of notice must be proved by direct evidence or by other facts from which it may be clearly inferred, and the inference must not be probable, but necessary and unquestionable.' Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870. Mere suspicion will not raise an inference that such purchaser had notice. Rogers v. Wiley, 14 Ill. 65, 56 Am. Dec. 491; Grundies v. Reid, 107 Ill. 304. There are circumstances in this record sufficient to raise a suspicion that defendant in error had notice, but we cannot say from this evidence that it is so clear and positive as to show, beyond a reasonable doubt, that the defendant in error purchased this property in bad faith or had actual or constructive notice of the deed to plaintiff in error, either directly or through her authorized agent, at the time the deed to herself was executed."

While the ruling in that case involved the allegations in a bill, we see no reason why the principle is not applicable to an answer.

The Record Shows Conclusively That Defendant Was a Bona Fide Purchaser.

In support of his contention that the evidence did not show that the defendant was a *bona fide* purchaser, counsel for appellant in his brief on this appeal does not call the court's attention to any evidence whatsoever except that of Mr. E. J. Marshall. His whole argument as to notice of alleged fraud in the procurement of the patents is based upon the proposition that because E. J. Marshall on two occasions went upon the V. T. Ranch and stayed over night at Jacobs Lake, the location of one of the claims in question, he will be presumed to know not only that there was no mineral in these claims but also that the patents had been procured by fraudulent representations. The contention thus made seems to us almost too absurd to merit serious consideration.

In the first place it would seem possible that counsel is laboring under the erroneous impression or belief that at all times and under all circumstances the burden of proving a want of notice is upon a defendant setting up the claim of *bona fide* purchaser. The authorities are somewhat at variance as to whether or not the burden of proving the defense of *bona fide* purchaser is on the defendant claiming it. It may be admitted for the moment, for the purposes of argument, that the weight of authority is in favor of putting the burden of proof of such defense upon the party setting it up. But the rule is well settled that where a party relying on such a defense *proves the payment of a valuable consideration, the burden of showing notice*

of fraud, either actual or implied, shifts to the party claiming such fraud.

In the case of Barton v. Barton, 75 Ala. 401, the court, considering this question, in its opinion says:

> "The rule as to proof of *bona fide* purchase is, that the party pleading it must first make satisfactory proof of purchase and payment. This is affirmative, defensive matter, in the nature of confession and avoidance, and the burden of proving it rests on him who asserts it. *Ei incumbit probatio, qui dicit. This done, he need not go further, and prove he made such purchase and payment without notice. The burden here shifts,* and if it be desired to avoid the effect of such purchase and payment, it must be met by counter proof, that, before the payment, the purchaser had actual or constructive notice of the equity or lien asserted, or, of some fact or circumstance, sufficient to put him on inquiry, which, if followed up, would discover the equity or incumbrance. Craft v. Russell, 67 Ala. 9, which collects the authorities: Taylor v. A & M. Asso., 68 Ala. 229; Cresswell v. Jones, *Ib.* 420." (Italics ours.)

United States v. Cowart, 205 Fed. 316;

Jones v. Simpson, 116 U. S. 614;

Casey v. Leggett, 125 Cal. 670.

Ross v. Wellman, 102 Cal. 4. In this case the Supreme Court of California, speaking through Commissioner Temple, said:

> "It is said in Jones v. Simpson, 116 U. S. 610, that it is incumbent upon the creditor attacking a sale on the ground that it was made to defraud creditors, first, to show fraudulent intent in the vendor, that the burden is then on the purchaser

to show valuable consideration, *which shown, the burden shifts*, and the creditor must show knowledge of the fraudulent intent of the vendor on the part of the vendee." (Italics ours.)

Eams v. Crosier, 101 Cal. 262;

Hawke v. Calif. etc. Co., 152 Pac. 962;

Bell v. Pleasant, 145 Cal. 410, 104 Am. St. 68, note;

Miller v. Fraley, 23 Ark. 735.

In Hart v. Church, 126 Cal. 480, the court (Justice Henshaw delivering opinion) said:

> "Elton Church having shown that he took the note and mortgage before maturity and that he paid a valuable consideration therefor, it was incumbent upon the plaintiff to prove that he had knowledge of the fraud and of the fraudulent intent of the vendor in making the sale to him."

In United States v. Lamm, 149 Fed. 585, a demurrer was sustained to a bill by the government to set aside a patent on the ground that it did not charge that the defendant was not an innocent purchaser for value.

Gratz v. Land Company, 82 Fed. 385.

We quote from Miller v. Fraley *et al.*, 23 Ark. 746, as follows:

> "The burthen of proving that appellees, or their attorney, had notice of the fraud was upon appellant, who charged the fraud, and sought thereby to destroy the legal title of appellee to the lands. The answer prepared and sworn to by the attorney, who made the purchase for appellees, and who is shown to have no interest in the matter,

denies most positively any knowledge or suspicion of the fraud, etc. He states as much in his deposition, and no witness contradicts him. How, then, can we say, upon principle, that he had notice. As said by Lord Hardwick in Heinn v. Dood, 2 Atk. 276, and repeated with approbation by Judge Story, in Flag v. Man. *et al.*, 2 Sum. 551, there ought to *be clear, undoubted notice, and suspicion of notice,* though a strong suspicion is not sufficient to justify the court in breaking in upon the legal rights of a purchaser."

We quote from opinion of Judge Ross in the case of Wyrick *et al.* v. Frank A. Weck *et al.,* 68 Cal. 10, as follows:

"It is said that the defense of a *bona fide* purchaser without notice is in the nature of new matter, the burden of proving which is upon the defendant. Ordinarily this is so. But here the plaintiffs allege that the defendants hold the legal title to the property, derived through the deed from Devenish, the patentee, and to charge them with the trust, expressly allege that at the time of their purchase they took with notice of the plaintiffs' equities. The proof on the part of plaintiffs was devoid of any fact tending to show notice on the part of defendants of plaintiffs' rights. There was nothing of record to put them on inquiry. The patent upon its face showed that the land was granted to Devenish, from whom defendants purchased, as is expressly charged in the complaint. *If there were matters in pais tending to show notice of plaintiffs' rights at the time of such purchase, as is also charged in the complaint, it was necessary for the plaintiffs to make the proof;* for without such proof the title must re-

main where plaintiffs have alleged it to be,—in defendants. (Code Civ. Proc., sec. 1891.)" (Italics ours.)

With respect to the case last cited it will be noted that the bill there, as in the case at bar, charged that the defendants "at the time of their purchase took notice of the plaintiffs' equities." (Italics ours.)

Defendant Paid a Valuable Consideration.

The evidence in this case, as is shown by our statement of the facts, conclusively shows that for the lands and cattle purchased by Mr. Marshall under the contract of July, 1907, there was paid the aggregate purchase price amounting to more than $212,000.00. By the terms of the contract it was the understanding that $50,000.00 should be considered as the price paid for the lands. Counsel for appellant in his brief makes the point that it is not definitely shown just what proportion of this $50,000.00 was considered by the parties as applicable to the patented lands in controversy; but we submit that no such burden was cast upon the respondent. *The contract is the measure of the rights of the parties.* By the terms of that contract an indivisible price of $50,000.00 was to be paid for all the patented lands and the unpatented claims. Manifestly it was impossible for Mr. Marshall, when testifying at the trial, or for anyone else, to segregate the price and show how much was paid for the patented claims. And it cannot be true that because of this condition of things respondent shall be deprived of its defense that it was

a *bona fide* purchaser. In order to be a *bona fide* purchaser, so far as consideration is concerned, it is necessary to show, with respect to the consideration, merely that it was a valuable one. It is not necessary to show that it was adequate. (Miller v. Fraley, 23 Ark. 736.) In this case, however, the testimony is uncontradicted that the consideration was adequate, or, as Mr. Marshall put it, the price paid for all the lands conveyed was a fair one. [R. 320.] If the price was fair for all the lands conveyed, necessarily it was fair for every part conveyed. The logic of this proposition seems to us indisputable, and the unexpressed value of any particular parcel, which may have been in the minds of either of the parties, in the course of their negotiations, is an entirely false quantity in the consideration of this case.

It is quite apparent from the record, however, though not important, that Mr. Marshall, in purchasing this property, and the Grand Canyon Cattle Company, as his assignee, considered that the patented claims were the really valuable parcels of the lands covered by the contract, and presumably for the very reason that these lands were patented and the title might be considered secure, whereas with respect to the unpatented claims the title must necessarily have been regarded as more or less precarious. As evidence of this we call attention to the fact that the contract of July 30, 1907, in express terms provided that warranty deeds should be given covering the patented claims, whereas only quit-claims were to be given with respect to the other in-

terests. Nothing could more clearly demonstrate the relative value in the minds of the contracting parties, particularly of Mr. Marshall, of the two classes of property. In other words, he regarded the patented claims of such relatively greater value that he insisted that he should be secured as to the title by warranty deed, whereas with respect to the others he was willing to take chances under a mere quitclaim. We do not see how it can honestly be contended, in the light of what the record discloses, that a very substantial value was not attributed by the purchaser to the patented claims and that a great portion, if not indeed all, of the $50,000.00 was considered by the purchaser as in fact being paid for the patented claims.

Counsel seems to attach some value to the statement of Mr. Marshall that he "did not attach much importance to the unpatented claims or ownership of anything in the forest reserve." Mr. Marshall probably had in mind only unpatented claims, as indicated by his subsequent explanatory statement at the bottom of page 337 of the Record. Only one patented claim was in the reserve, the Jacobs lode (appellant's brief, page 2, and map referred to). But of what importance is the fact, even if it be admitted to be a fact, that Mr. Marshall did not consider the claims within the forest reserve of great value. He testifies he paid their value, whatever it was, and paid it in hard cold cash, and, by the way, during the panic of 1907, when large or even small sums of money were hard to raise; and in passing we might suggest that it is hardly within the realm of possibility that a man

of large business affairs, such as Mr. Marshall is shown by the record to be, would hardly at a time of such financial distress and peril, nor indeed at any time, have paid over $50,000.00 for property the title to which he knew, or ought to have known, as appellant contends, had been fraudulently acquired by his vendor. Certainly in the light of all these facts it is folly to contend that a valuable consideration was not paid for these patented claims.

A Valuable Consideration Having Been Proved to Have Been Paid, the Burden of Showing Notice of the Alleged Fraud Rested Upon the Respondent, and This Notice, Under the Rule Laid Down by the Federal Courts, as Well as by the State Courts, Must Be Established by Clear and Convincing Proof Which Would stop Little Short of Proof Beyond a Reasonable Doubt.

Probably the leading case in the federal courts upon the question of the character of proof required to set aside a patent on the ground of fraud, is Maxwell Land Grant case, 121 U. S. 325. We quote from the opinion in that case (p. 381) as follows:

> "We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of pri-

vate individuals, *how much more should it be observed* where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, *the immense importance and necessity of the stability of titles dependent upon these official instruments,* demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; *but it should be well understood that only that class of evidence which commands* respect, and that amount of it which produces *conviction, shall make such an attempt successful."* (Italics ours.)

In the case of Colorado Coal Co. v. United States, 123 U. S. 316, the court quotes with approval from the opinion in the Maxwell Land Grant case, and then says (p. 317):

"It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless

can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish. It is, indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text:"

In U. S. v. Stinson, 197 U. S. 204, the court, speaking through Justice Brewer, calls attention to the fact that the stability of titles demands that United States patents shall not be set aside except upon the most clear and convincinig evidence. We quote from the opinion:

"Second. The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, and presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' Maxwell Land-Grant case, *supra*, p. 381; United States v. Iron Silver Mining Co., 128 U. S. 673, 677; United States v. Des Moines &c. Company, *supra*, p. 541.

"Third. It is a good defense to an action to set aside a patent that the title has passed to a *bona fide* purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but also will protect the rights and interests of innocent parties. United States v. Burlington & Missouri

River Company, 98 U. S. 334, 342; Colorado Coal Company v. United States, *supra,* p. 313— a case in which, as here, suit was brought to set aside land patents on the ground that they had been obtained by fraud, and in which we said:

'But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a *bona fide* purchaser for value without notice is perfect.' "

It will be noted that this is a case involving a defense of *bona fide* purchaser, and presumably the rule as to the quantum and character of proof applies to the question of notice as well as to the matter of fraud in the procurement of the patent; that such is the law we shall show by authorities hereafter cited.

A very thorough discussion of the law governing the setting aside of patents in suits by the United States is found in the opinion of Justice Brewer in the case of United States v. Detroit Lumber Company, 200 U. S. 321. We quote from page 331 as follows:

Also from page 333, as follows:

"We do not understand the law to be stated, or that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of his claim to the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would

shake the foundations of commercial business. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. Jones v. Simpson, 116 U. S. 609, 615. *He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title.*" (Italics ours.)

"'A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, p. 622, where he says: "In Ware v. Lord Egmont the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it *but for his gross negligence in the conduct of the business in question.* The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but

whether not obtaining was an act of gross or culpable negligence.'" (Italics ours.)

Our contentions in this case, we believe, are fully sustained by this Honorable Court in the opinion rendered by Judge Ross in the case of U. S. v. Clark, 138 Fed. 295, wherein the rule is laid down that these patents are not to be set aside as against purchasers upon evidence amounting to mere suspicion, but only upon proof that produces conviction. The matter which we have quoted from Maxwell Land-Grant case is quoted in the opinion at length. See same case on appeal, 200 U. S. 601, 608. That mere suspicion, even though strong, does not amount to proof of notice in these cases, is also held by the Supreme Court of Arkansas in Miller v. Fralley, 23 Ark. 746.

We quote from Reed v. Munn, 148 Fed. 756:

"'No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. James v. Simpson, 116 U. S. 609, 615, 6 Sup. Ct. 538, 29 L. Ed. 742. He is not bound to make a searching examination of all the account books of the vendor, nor to hunt for something to cast a suspicion upon the integrity of the title. * * * The rule in respect to constructive notice was thus stated in Wilson v. Wall. (U. S.), 83, 90, 91, 18 L. Ed. 727: "A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair

consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, p. 622, where he says: 'In Ware v. Lord Egmont the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.'" And again in Townsend v. Little, 109 U. S. 504, 511, 3 Sup. Ct. 557, 561, 27 L. Ed. 1012: "Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. Plumb v. Fluitt, 2 Anst. 432; Kennedy v. Green, 3 My. & K. 699. * * * As said by Strong, J., in Meehan v. Williams, 48 Pa. 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. See, also, Holmes v. Stout, 3 Green Ch. 492; McMechan v. Griffing, 3 Pick. 149, 15 Am. Dec. 198; Hanrick v. Thompson, 9 Ala. 409." ' "

To the same effect see Wilson v. Wall, 6 Wallace 83, 91, where the language of Chancellor Cranworth in Ware v. Lord Egmont, referred to in the opinion in the Detroit case, is quoted with approval.

That the rule as to the convincing character of the evidence applies to the question of notice is squarely held by the Supreme Court of California in People v. Swift, 96 Cal. 169. After quoting from the Maxwell Land-Grant case that part of the opinion that deals with the character of evidence, the Supreme Court of California, says:

> "The foregoing rule of evidence not only applies to the matter of fraud practiced upon the Government by the entrymen or others in the actual procurement of the patent, *but applies with equal force and effect to the good faith and innocence of the subsequent grantee.*" (Italics ours.)

One of the reasons which might be assigned for making this rule as to character of proof in these cases applicable to the question of notice, is that a purchaser with notice becomes a party to the fraud. It is a case of *mala fides* and not *bona fides,* so that it may well be said that proof of notice is in reality proof of fraud on the part of the purchaser. This idea is borne out by the decision of the Supreme Court of Massachusetts, in the case of McMechan v. Griffing, 15 Am. Dec. 198, 3 Pick 149. We quote from the opinion on pages 200 and 201:

> "In the case of Le Neve v. Le Neve, Lord Hardwicke says: 'That the taking of a legal estate, after notice of a prior right, makes a person a

mala fide purchaser. This is a species of fraud, and *dolus malus* itself; for he knew that the first purchaser had the clear right to the estate, and after knowing that, he takes away the right to another person by getting the legal estate. And this exactly agrees with the definition of the civil law of *dolus malus;* Dig., lib. 4, tit. 3, lex. 2. Fraud, or *mala fides,* therefore, is the true ground on which the court is governed in cases of notice.' 3 Atk. 654."

Heine v. Dodd, 2 Atk. 275, also lays down the rule that "suspicion, even though it be a strong suspicion," is not sufficient to justify a court in finding that a purchaser had notice.

In the case of Lowden v. Wilson, 84 N. E. (Ill.) 245, the court, on page 248, says:

"The title of a subsequent purchaser whose deed is first recorded will not be defeated on the ground of notice of a prior unrecorded deed, 'unless the proof of such notice is so clear and positive as to leave no reasonable doubt that the taking of the second conveyance was, under the circumstances, an act of bad faith towards the first purchaser. The fact of notice must be proved by direct evidence or by other facts from which it may be clearly inferred, and the inference must not be probable, but necessary and unquestionable.' Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870. Mere suspicion will not raise an inference that such purchaser had notice. Rogers v. Wiley, 14 Ill. 65, 56 Am. Dec. 491; Grundies v. Reid, 107 Ill. 304. There are circumstances in this record sufficient to raise a suspicion that defendant in error had notice, *but we cannot say*

> *from this evidence that it is so clear and positive as to show, beyond a reasonable doubt,* that the defendant in error purchased this property in bad faith or had actual or constructive notice of the deed to plaintiff in error, either directly or through her authorized agent, at the time the deed to herself was executed." (Italics ours.)

Grundies v. Reid, 107 Ill. 310, where the court in its opinion (p. 311) says:

> "But in McMechan v. Griffing, 3 Pick. 154, it was said, with reference to notice of an unregistered deed 'The fact of notice must be proved by *indubitable evidence,*—either by direct evidence of the fact, or by proving other facts from which it may be clearly inferred. It is not, in such case, sufficient that the inference is probably,—it must be necessary and unquestionable." (Italics ours.)

We believe we have conclusively established the following propositions of law: First, that even admitting, for the purpose of argument, that the defense of *bona fide* purchaser is an affirmative one which must be proven by defendant, nevertheless, when the defendant proves the payment of a valuable consideration the burden of proving notice to such purchaser shifts to the complainant; second, that proof of notice must be clear and indubitable and such as produces conviction in the mind of the court.

Such being the law which controls this case, we feel amply justified in asserting that the record utterly fails to show that the defendant Grand Canyon Cattle Company, or Mr. Marshall, had any notice

whatever of, or knowledge of, any fact or facts sufficient to put him or it upon inquiry with respect to the fraud claimed to have been practiced upon the Government by Saunders in the procurement of the patents. There was nothing to even excite suspicion of any such fraud.

As we have before observed in our statement of the facts of this case, the only testimony relied upon by the Government on this appeal to show notice is that of Mr. Marshall. Evidently counsel realized, as did everybody else connected with the case, including the court below, that the attempt to show notice by other witnesses was a complete failure and the Government on this appeal has been driven by dire necessity to claim that because Mr. Marshall drove over this ranch in a hurried fashion on two occasions, on neither of which did he examine these claims, or any of them, that he is charged with notice of the alleged fraud of Saunders. In the light of the rules laid down by the authorities to which we have invited the court's attention, as to character of proof required in cases of this kind, it seems almost a vain thing for us to analyze or review the evidence in order to point out its utter inadequacy to prove any notice whatever to Mr. Marshall or the respondent. It is not a case of conflicting evidence, it is not a case of interpreting the evidence. It is a case where there is *absolutely no evidence* of any notice whatever or knowledge sufficient to put upon inquiry, or even to excite suspicion. It is even more than that, the record in this case shows affirmatively, and without conflict, that neither Mr.

Marshall or the company had any notice or knowledge whatever of the alleged fraud.

The argument of counsel amounts to this and nothing more: That because Mr. Marshall knew that the patents covered mining claims and he did not see any mining operations carried on he was bound to make a full investigation, which, according to counsel's contentions, would have brought home to him sufficient knowledge of the alleged fraud of Saunders to charge him with notice.

If there is any one fact that the history of this country makes plain and certain, it is that there are literally thousands of mining claims which have been duly patented and which have never been worked as mines. And in many instances such claims are occupied and used by the owners for purposes other than mining.

Can it be said, when the United States has by its solemn act, and presumably after proper investigation by its duly appointed officers, issued its patent which in the eyes of the law is one of the highest muniments of title, that an intending purchaser of land covered by such patent is bound, in the first instance, to go behind the patent and investigate all of the antecedent facts and conditions? Most certainly not, for if the law were otherwise, a patent from the United States government, instead of being a substantial muniment of title, as it is meant to be, would be a delusion and a snare, and titles coming from the government, instead of being stable, as the courts declare they should be, would be uncertain and precarious to the last degree.

In the case of United States v. Cal. & Ore. Land Company, 148 U. S. 44, which involved the rights of persons claiming to be innocent purchasers, the court in its opinion, by Justice Brewer, says (p. 45):

> "If a patent from the government be present, surely a purchaser from the patents is not derelict, and does not fail in such diligence and care as are required to make him a *bona fide* purchaser because he relies upon the determination made by the land officers of the government in executing the patent, and does not institute a personal inquiry into all the anterior transactions upon which the patent rested."

As we have before stated, the record shows conclusively and without any contradiction whatsoever that the only claim Mr. Marshall ever visited was Jacob's Lode, where he stayed one night on the occasion of each of his two visits. He testified with respect to Jacob's Lode as follows:

"In looking over the improvements I didn't go into any tunnel or examine any shaft or examine the character of ground. I gave it no attention at all." [R. 308.]

He further testified that "the only one of those claims we visited on this occasion was Jacob's Lake. I didn't go to any of the others. The closest we went to any of the others, I should say, was from a half a mile to a mile." [R. 309.]

The foregoing testimony relates to the first visit to the ranch. As to the second visit he testified as follows:

"The occasion of my going was more a pleasure trip than anything else, and I took two guests with me, Mr. Isaac Millbank and Mr. Nicholas Millbank, his brother. It was more like a camping trip." [R. 312.]

On page 313 of the record he states:

"I didn't on that occasion visit any of these mining claims. As a result of my two visits to this property I got no impression at all of these patented mining claims as to their mineral features. My examination of those lands was not with any reference to minerals. There was no statement made to me by anybody with respect to their mineral character or with respect to their development."

And there is not a scintilla of evidence in the testimony in any way derogatory to the perfect truthfulness of these statements. They stand as admitted facts in this case. How utterly flimsy, to make no harsher criticism, is the claim of the government in the brief filed herein, that under the circumstances which this record discloses there were facts brought to the attention of the purchaser sufficient to put him upon inquiry. We marvel that the government of the United States should continue to further prosecute this suit against this respondent or that counsel would have the temerity to assert to this court that the evidence in this record shows that this respondent, or Mr. Marshall, was not acting in good faith in the purchase of this property.

Counsel, impliedly at least, seems to make the point that because there may have been a lack of good mineral indications disclosed by the work done upon these

claims, this was sufficient to put a purchaser upon inquiry as to the alleged fraudulent acts of Saunders, notwithstanding the fact that the government deemed it necessary to employ the services of experts with their assays in its effort to establish its claim in court as to the non-mineral character of the claims.

Another fact which we say the history of this western country has definitely established is that there is nothing more unreliable than surface indications of ground as to whether it is mineral or non-mineral. It is a matter of common knowledge that frequently mines are uncovered where the surface indications gave no evidence that a mine would be found. On the other hand many a man has "gone broke" in developing a claim where the surface indications were of the finest and yet the mineral discovered in prospecting or developing work would not be sufficient, if the real conditions were known, to entitle the claimant to a patent. In this connection we might call to the attention of the court that the testimony shows that on the Jacob's Lake claim which Mr. Marshall visited there was copper-stained rock in a dump and scattered about on the claim. Witnesses for the government establish this fact. Joseph Jensen testified he found "some copper-stained rock lying on the claim." [R. 159.] Mr. Walker said he found some copper-stained rock on the Jacob's lode and that "it is possible that the copper-stained rock did come out of the cut in the Jacob's lode." [R. 134.] He further states, referring to the Jacob's lode, "I observed a little copper stain on a very little loose rock on the dump at this

cut." [R. 133.] The government introduced assay certificates of some samples from Jacob's lode which Mr. Walker had assayed, which showed a trace of copper. [R. 144-5.] It appears that the country where these claims were situated is a mineralized country, and that within a short distance from the Jacob's claim was a copper mine which had been worked to some extent. Mr. Dimick, witness for the government, testified [R. 47]:

"I am not an engineer or geologist, just a cowpuncher. I cannot say of my own knowledge whether or not this land included in the Jacob's lode, so-called, or Jacob's Lake, contained mineral. *I would think it did from the looks of the rock. I saw there practically the same kind of rock as the Petosky and Coconino Company were working.* The nearest claims the Petosky and Coconino were worked would be a half mile from the Jacobs lode. They claimed they were working copper. * * * I never knew of any mineral being shipped from the Jacob's lode. There was mineral shipped from the Petosky or Coconino mills. There was a mill and a smelter there."

This witness for the government, who had lived in and ridden over this country for years, and who presumably had far greater knowledge of mineral lands than could be attributed to Mr. Marshall, was of the opinion that Jacob's lode contained mineral, yet counsel for appellant contends that Mr. Marshall knew or was bound to know that the land was so deficient in mineral that there could not be a discovery, within the meaning of the mining law, upon which a patent might

have legally issued, and that Saunders must have made fraudulent representations in support of his application for a patent.

A person does not have to have a real mine to entitle him to a patent; a prospect may be sufficient even though a mine is never developed; counsel would contend that Mr. Marshall was bound to know that there never was even a prospect; that Saunders had wilfully perjured himself in his application for the patents. We forbear to comment on the fallacy of any such contention.

While we have assumed for the purpose of the foregoing argument, and counsel have assumed as a fact, that the court below based its finding of "legal fraud" upon false representations by Saunders as to the mineral character of the land, yet it should be borne in mind that there is no sufficient warrant for any such assumption, because, for aught that appears in the record, the court may have considered representations made by Saunders as to the mineral character of the land to be true, and based its finding of "legal fraud" on other false representations charged in the bill, such as, for instance, the amount of money expended in development work. If we should assume that such was the basis of the court's decision, we believe it would hardly be contended that there is anything in the record which would show that Mr. Marshall had notice, either express or implied, of the falsity of any such representations, much less that they were fraudulently made. All presumptions in favor of the judgment of the lower court not inconsistent or at variance

with the clearly established facts appearing in the record are to be indulged in favor of the decree of the lower court, so that if it should be necessary to do so this court might well say that the decree of the lower court was placed upon the ground that Mr. Saunders was guilty of "legal fraud" in respect of the representations made by him as to the amount spent in developing the claims. We deem it unnecessary to cite authorities in support of this principle.

We feel confident, however, that so plain are the other points made by us in support of the lower court's decree that there will be no necessity for invoking it.

Counsel's argument is based upon the further unwarranted assumption that because the claims may have been deficient in mineral Mr. Marshall was bound to know that the patents had been procured by fraudulent representations as to the mineral character of the land. But such is far from being the law; for it is true that a claim may not, as a matter of fact, contain mineral in sufficient quantity to entitle the claimant to a patent, yet if he believes that it does, and acts in good faith in respect to his application, and practices no fraudulent methods, the patent will not be set aside.

In the case of U. S. v. Iron River Silver Mining Company, 34 Fed. 569, Justice Brewer, delivering the opinion of the court, held that "before a court will set aside a patent to mineral land on the ground of fraud, it must appear not merely that the applicant was mistaken as to the character of the land, but that the representations in regard thereto were falsely *and fraud-*

ulently made, and this fact must clearly appear." The decree in this case was affirmed by the Supreme Court of the United States on appeal, 128 U. S. 673.

The only cases cited by counsel on the question of notice are the two on page 10 of his brief, and we will not consume the time of this court in analyzing them. An examination of them will clearly disclose that they fall entirely short of supporting any of counsel's contentions and in no wise militate against the position we have taken. They merely establish that where a person has knowledge of facts sufficient to put him upon inquiry, within the meaning of the law, he is presumed to have notice. We have no quarrel with this doctrine—it is the law. But the government in this case has entirely failed to bring this case within the principle. We assert as a fact, and the record bears us out, that every part of the transaction whereby the respondent acquired title to these lands, including all of the acts of Mr. Marshall, was clean and honest and done in the best of faith, and we respectfully ask that the decree be affirmed.

Respectfully submitted,

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Henry J. Stevens,
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